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No. 14-981

In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF KIMBERLY WEST-FAULCON IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Fifth Circuit's holding that the University of Texas at Austin's 2008 undergraduate admissions policy did not violate the Equal Protection Clause of the Fourteenth Amendment should be sustained.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. Institution-Specific Analysis of UT Austin's Admissions Policies and Outcomes Support the Fifth Circuit's Holding that UT Satisfied this Court's Stringent Strict Scrutiny Standard 6

A. Non-Top 10% White Applicants Were Admitted to UT Austin at a Rate of 22.3% Compared to a Rate of 10.4% for Latinos and 8.8% for Blacks 8

B. UT's Policy of Admitting the Greatest Number of Students Based Solely on Class Rank, Other Students Based Heavily on SAT Scores, and Some Considering Five Times As Many Socio-Economic Sub-Factors As the Single Race-Conscious Sub-Factor Was Definitely Narrowly Tailored and Did Not Harm White Applicants 9

C. The Court Should Not Be Misled to Believe that Social Science Evidence Exists that Proves "Large Racial Preferences" in the Form of a "Black Bonus" or an "Asian Penalty" By Which Black Applicants Are Awarded Extra Points or Points Are Deducted From Asian Applicants Because of Their Race 13

II. This Court Should Ignore the Incorrect Assertion, Based on Incomplete and Cherry-Picked Findings, that "Affluent Blacks" Prevent Low-Income Students From Attending Selective Universities 18

A. Revisiting This Court's Ruling in *San Antonio v. Rodriguez*, Not Striking Down UT Austin's Restrained Race-Consciousness, Would Redress Socio-Economic Injustice and Economic Class-Based Discrimination in Higher Education Admissions 19

B. Because the Number of "High Income," "Upper Class," "Wealthy Blacks" or "Prep School Educated Blacks" is Quite Scant, it is Inaccurate to Claim that the Exclusion of this Particular and Scarce Type of African American High School Student Will Redress Widespread Socio-Economic Injustice Against the Very Large Number of White Low-Income Students Regularly Excluded from Elite Higher Education..... 20

C. None of this Court's Narrow Tailoring Precedent Requires UT Austin to Exclude the Historically Small Number of Middle and Upper Class African Americans in the Name of Socio-Economic Justice or Purported "Mismatch" Based on SAT Scores 24

III. It Would Violate Principles of Federalism for this Court to Define for the Flagship Public University in the State of Texas the Extent to Which Race Still Matters 25

IV. The Court Should Reject "Folk" Understandings of Test Scores and Note That Racial Skews in the Averaged Scores of Blacks as Compared to Whites Do Not Mean Blacks As a Racial Group are Undeserving When Admitted to Selective Colleges and Universities 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Ashwander v. Tennessee Valley Authority,
297 U.S. 288 (1936) 7

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 16

Fisher v. University of Texas at Austin,
758 F.3d 633 (5th Cir. 2014) 6

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275 U.S. 78 (1927) 16

Hernandez. v. Texas,
347 U.S. 475 (1954) 16

Muskrat v. United States,
219 U.S. 346 (1911). 7

People v. Hall,
4 Cal. 399 (1854) 16

Ricci v. DeStefano,
557 U.S. 557 (2009) 3

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334 U.S. 1 (1948) 16

Sweatt v. Painter,
339 U.S. 629 (1950) 17

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66 Cal. 473 (1885) 16

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576 U.S. ___, No. 13-1371, slip op. at 5 (June 25, 2015) 17

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161 F.2d 774 (9th Cir. 1947) 16

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Amicus Curiae Brief of The Center for Individual Rights in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015) 7

Second Amended Complaint 22 *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) 10

Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment at 8, *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 (W.D. Tex. 2009) (No. 08-00263-SS) 10

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THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE (2009) 14, 20, 21

Brief Amicus Curiae of Gail Heriot and Peter N. Kirsanow in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015) 7

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INTEREST OF AMICUS CURIAE

Institution-specific analysis of the admissions policy of the University of Texas at Austin ("UT Austin" or "UT") illuminates the correctness of the Fifth Circuit's conclusion that the policy did not violate the equal protection rights of petitioner Abigail Fisher. Ideological opposition to racial affirmative action has the potential to cloud the true facts about UT Austin's Fall 2008 admissions policy, particularly the fact that white applicants were admitted at higher rates under the portion of the admissions policy that petitioner Abigail Fisher alleges discriminated against her because she is white.

Empirical research on the details and outcomes of the Fall 2008 UT Austin admissions policy—such as the fact that non-top ten percent white applicants were admitted at double the rate of African American and Latino applicants—as well as research on the "average test score fallacy" demonstrate that UT Austin's admissions policy was narrowly tailored to achieve the institution's compelling interest in admitting a diverse undergraduate class. *Amicus Curiae*[1] has written this brief to bring to the Court's attention the portions of this research that seem most relevant to the issues under consideration in *Fisher v. University of Texas, et al.*

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[1] The parties have filed blanket consents to the filing of *amicus* briefs in this case. No party to this case or counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae and amicus counsel paid for or made a monetary contribution to fund the preparation or submission of this brief. *Amicus curiae* files this brief as an individual and not on behalf of the institution with which *amicus curiae* is affiliated.

Amicus curiae is Kimberly West-Faulcon,[2] a professor of constitutional law and a nationally recognized scholar pioneering interdisciplinary research of law and intelligence testing that exposes the legal implications of modern research from the fields of psychology, statistics, and psychometrics. Professor West-Faulcon's research bears directly on the questions of (1) whether the Fifth Circuit was correct in its ruling that UT Austin's Fall 2008 admissions policy meets the rigorous strict scrutiny analysis applied to racial classifications under the Court's equal protection jurisprudence, (2) whether the systematic exclusion of low-income students from selective higher education has a legal or empirical relationship to the constitutional issues currently before this Court, and (3) whether social science research finding smaller racial differences in more theoretically sophisticated modern intelligence and college admissions tests demonstrates that the minimal racial attentiveness of UT's admissions policy is narrowly tailored to compensate for the theoretical inadequacies of traditional college admissions tests like the SAT. She files this brief in order to acquaint the Court with this research and to explain its relevance to the constitutionality of the 2008 UT Austin admissions policy.

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[2] Kimberly West-Faulcon holds the James P. Bradley Chair in Constitutional Law at Loyola Law School in Los Angeles.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under every possible route to admission to the University of Texas at Austin ("UT" and "UT Austin"), the admission rate for Caucasian applicants was equal to or better than the admission rate for other racial groups.[3] Most significant to the matter before this Court, white students whose high school grades ranked *below* the top ten percent of their graduating class ("Non-Top 10%")—students like petitioner Abigail Fisher—were admitted to UT Austin at a *higher rate than all other racial groups.* In fact, the admission rate for Non-Top 10% whites—22.3%—was *more than double* the admission rate for Latino and African American applicants.[4]

Whereas this Court has previously disapproved of decisions "based solely" on race,[5] UT's admissions policy considered race in a very limited and contextualized manner. For over 80% of the students admitted to UT in Fall 2008—those who were Top

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[3] *See* Kimberly West-Faulcon, *Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in Fisher v. Texas*, 29 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 335, 353 (Steven Saltzman & Cheryl I. Harris, eds. 2013) (analyzing publicly available UT Austin admissions data reported in Univ. of Tex. at Austin Office of Admissions, Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin, Demographic Analysis of Entering Freshmen Fall 2008, Report 11 (2008), available at http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf [hereinafter *UT Freshman Fall 2008 Report*].

[4] *Id.*

[5] *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 593 (2009).

10%,[6] race was *not a factor at all*. Instead, for that vast majority, high school class rank was the *sole* factor in their admission. For Non-Top 10% students like Abigail Fisher, SAT scores mattered profoundly more than race. Only if a Non-Top 10% applicant's academic credentials were not strong enough to garner automatic admission under the SAT-driven route to admission did UT Austin use a more comprehensive, holistic review that plotted applicants on a grid based on a combination of academic and personal achievement characteristics. Under this multi-factor review, race could be considered as one sub-factor of a seven sub-factor "special circumstances" personal achievement factor.[7] In addition to race, there were five socio-economic-related sub-factors.[8]

In light of the restrained manner in which race was employed in UT admissions, the Court should apply its well-settled equal protection jurisprudence and decline the invitation by petitioner and various amici to establish a national higher education admissions policy. This Court should ignore the enticing yet profoundly incorrect theories (i) that "class *but not* race" matters in American society, (ii) that Black and Latinos would be better off if universities' use of racial affirmative action were substantially scaled back or eliminated altogether, and (iii) that racial affirmative action could be eliminated and replaced with socio-economic affirmative action with-

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[6] Brief of the United States at 8, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) ("In 2008, 81% of all freshmen, and 92% of all Texas residents admitted as freshmen, were Top Ten Percent applicants, leaving only 841 slots to be filled by Non-Top Ten Percent applicants.").

[7] *See UT Freshman Fall 2008 Report*, *supra* note 3, at 2.

[8] *Id.*

out substantially reducing the admissions chances of Black and Latino high school students.[9]

This brief explains why this Court should be wary of these provocative but unsubstantiated theories, particularly because support for them relies on cherry-picking and decontextualized citation of social science studies (often to reach conclusions either wholly opposite from or inconsistent with the conclusions and statements in the studies themselves).[10] The Court should be particularly wary of claims[11] based on sample sizes as small as "a total of 61 black respondents at elite schools"[12] and an incomplete "first draft" report based on "fully responsive" survey responses from only 9 "flagship colleges."[13]

If the actual details and outcomes of the Fall 2008 admissions policy of UT Austin are considered, it is clear that Abigail Fisher had a constitutionally fair opportunity to compete for admission. Because the race consciousness of UT's admissions policy was

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[9] *See, e.g.*, Brief Amicus Curiae for Richard Sander and Stuart Taylor in Support of Neither Party, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015); Brief of Richard D. Kahlenberg as Amicus Curiae in Support of Neither Party, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015).

[10] *See infra* Part I.C. and Part II.B.

[11] *See, e.g.*, Brief Amicus Curiae for Richard Sander and Stuart Taylor, *supra* note 9, at 8.

[12] *See* RICHARD SANDER & STUART TAYLOR, JR. MISMATCH 249 Figure 16.1 (2012).

[13] *See* Richard Sander, *"Admissions Practices at Public Universities" available at* https://law.ucla.edu/faculty/faculty-profiles/richard-h-sander/bibliography/ (10-page first draft report dated Sept. 10, 2015 stating "its timing dictated, frankly, by our submission of a Supreme Court brief in *Fisher v. University of Texas*" that "we will be substantially expanding and revising" over "the next couple of months").

highly restrained (a single sub-factor considered in conjunction with five socio-economic sub-factors), because whites were selected at substantially higher rates than all other racial groups, and because the flagship university in the State of Texas has the power to decide for itself that "both race *and* class matter," the Fifth Circuit was correct to conclude that UT's policy was justified by a constitutionally sufficient compelling government interest and was sufficiently narrowly tailored to meet the high standard of strict scrutiny set forth by this Court in *Fisher I*.

ARGUMENT

I. Institution-Specific Analysis of UT Austin's Admissions Policies and Outcomes Support the Fifth Circuit's Holding that UT Satisfied this Court's Stringent Strict Scrutiny Standard

The Fifth Circuit relied on a deep and detailed understanding of the UT Fall 2008 admissions policy to reach its conclusion that the policy did not violate the Equal Protection Clause.[14] In contrast, it is notable that several amici curiae opt not to discuss the facts surrounding the admissions policy at issue.[15]

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[14] *Fisher v. University of Texas at Austin*, 758 F.3d 633, 646-49, 653-59 (5th Cir. 2014).

[15] See, e.g., Amicus Curiae Brief of The Center for Individual Rights in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015); Brief Amicus Curiae for Richard Sander and Stuart Taylor, *supra* note 9; Brief of Richard D. Kahlenberg, *supra* note 9; Brief Amicus Curiae of Gail Heriot and Pe-

These briefs unabashedly ask this Court to create education policy for selective colleges and universities and to violate its longstanding rule of eschewing advisory opinions.[16]

Race was included in an exceedingly restrained fashion in the Fall 2008 admissions policy challenged by petitioner. The record is clear that the UT Austin admissions policy did *not* give automatic special consideration to an individual applicant because of his or her race and, in the limited instances where an applicant's race was considered, that the policy also did *not* restrict the positive consideration of race to any one racial group.[17] There is no evidence that the limited form of racial attentiveness permitted by UT's admissions policy had any substantive impact on petitioner's admissions decision.

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ter N. Kirsanow in Support of Petitioner, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015); Brief of David Orentlicher as Amicus Curiae Supporting Neither Party, *Fisher v. Univ. of Tex. at Austin* (No. 14-981) (2015).

[16] *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 324 (1936); *Muskrat v. United States*, 219 U.S. 346, 356 (1911).

[17] *See* Brief of Respondents, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 26 (2013) ("any applicant—of any race—can benefit from UT's contextualized consideration of race").

A. Non-Top 10% White Applicants Were Admitted to UT Austin at a Rate of 22.3% Compared to a Rate of 10.4% for Latinos and 8.8% for Blacks

For high school students who graduated in the top ten percent of their high school class, white students were admitted at the exact same rate as students from other racial groups—100%.[18] White students whose high school grades ranked below the top ten percent of their high school graduating class—students like petitioner Abigail Fisher—were admitted at a higher rate than all other racial groups. The white Non-Top 10% admission rate of 22.3% was the highest admission rate of all racial groups.[19] In contrast, Non-Top 10% Asian Americans were selected at a somewhat lower rate of 21.7%.[20] Significantly, Non-Top 10% African Americans and Non-Top 10% Latinos were admitted at substantially lower rates than white Non-Top 10% applicants—10.4% for Latinos and 8.8% for African Americans.[21]

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[18] *See* West-Faulcon, *Forsaking Claims of Merit*, *supra* note 3, at 351 (analyzing publicly available UT Austin admissions data reported in *UT Freshman Fall 2008 Report*, *supra* note 3, at 6,8).

[18] *Id.* at 350. (analyzing publicly available UT Austin admissions data reported in *UT Freshman Fall 2008 Report*, *supra* note 3, at 6,8).

[19] *Id.* at 353.

[20] *Id.*

[21] *Id.*

B. UT's Policy of Admitting the Greatest Number of Students Based Solely on Class Rank, Other Students Based Heavily on SAT Scores, and Some Considering Five Times As Many Socio-Economic Sub-Factors As the Single Race-Conscious Sub-Factor Was Definitely Narrowly Tailored and Did Not Harm White Applicants

Though SAT scores played a critical and likely determinative role in the admission of Non-Top 10% applicants, UT did not apply lower test standards to African American and Latino applicants. First, no African-American or Latino applicant with lower admissions scores than Abigail Fisher was admitted to UT Austin for the 2008 regular fall admissions cycle and only five such applicants were admitted for summer admission.[22] Second, a significant number of white applicants—forty-two (42)—with test scores "identical to or lower than" Fisher were admitted.[23] Third, 168 Black and Latino students with credentials "identical to or *higher* than" Abigail Fisher were *denied* admission.[24] Thus, UT *rejected Black and Latino applicants with higher scores* than Abigail Fisher and *admitted other white applicants with lower scores* than Fisher.

For Non-Top 10% applicants, a number of slots were awarded to applicants based solely on their

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[22] Brief for Respondents, *supra* note 17, at 16 n.6.

[23] *Id.*

[24] *Id.*

predicted first-year GPA[25]—an "academic index" ("AI")[26] score calculated by inputting an applicant's SAT score and a fraction comparing their class rank and class size into a multiple regression equation.[27] Because Abigail Fisher's SAT score—1180 (out of 1600) was relatively low compared to other applicants,[28] Fisher's 3.1 academic index score was a full 1 point below the highest possible academic score of 4.1 points.[29] Thus, due to her relatively low SAT score, Fisher was not one of the Non-Top 10% students admitted based solely on a high academic index score.

In sum, Abigail Fisher was ineligible for admission to UT Austin under the two primary routes—(1) admission based solely on class rank and (2) admission based solely on a SAT score-driven numerical prediction of freshman GPA (academic index score). Fisher's ineligibility for admission under these admissions policies had nothing to do with her race. Instead, it had everything to do with her grades and

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[25] *See* Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment at 8, *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 (W.D. Tex. 2009) (No. 08-00263-SS).

[26] *See UT Freshmen Fall 2008 Report*, *supra* note 3, at 3. The academic index score could range from 0 to 4.1. *Id.*

[27] *UT Freshmen Fall 2008 Report*, *supra* note 3, at 2. This by-the-numbers, formula-driven "prediction" of a high school applicant's future grades in college is useful but imperfect and has been the subject of criticism for its limitations. *See, e.g.*, Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1109-11 (2009).

[28] Second Amended Complaint 22 *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013).

[29] *See* Brief for Respondents, *supra* note 17, at 15.

SAT scores. Because neither Fisher's class rank nor her SAT test scores were particularly competitive, her only chance of admission to UT would have been through the non-automatic, holistic admissions process for Non-Top 10% students who did not qualify for automatic admissions based on their class rank or their academic index score.

The final possible route to admission to UT Austin for Abigail Fisher involved admissions readers using Fisher's academic index score (along the horizontal axis) as well as her "personal achievement index" ("PAI") score[30] (along the vertical axis) to plot her position in a "cell" on UT's two-axis "admission decision grid" for subsequent cell-by-cell selection.[31] The calculation and use of the PAI to plot a place on the UT decision grid constituted an expansion of UT's assessment of student "merit" beyond SAT scores and class rank.[32] The PAI score was a number computed using a formula comprised of three subscores—two distinct written essay scores[33] and a

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[30] *See UT Freshmen Fall 2008 Report*, *supra* note 3, at 3. The personal achievement index score could range from 1 to 6. *Id.*

[31] *Id.* ("[a]dmissions liaisons, and/or representatives of Deans' office or faculty, then make decision as to which cells [of the admissions decision grid] to select as admitted students").

[32] *Id.* at 2 According to the UT admissions office, the inclusion of the "personal achievement factors and subcomponents" as admissions factors in addition to an applicant's test scores and class rank served to broaden the concept of merit in UT admissions to include "the ambition to tackle rigorous high school coursework, the production of quality prose, and the desire to make a difference in one's school, home, or community" as well as "evidence of employability (work), and some sense of having excelled in any number of areas are also considered." *See* Brief of Respondents, *supra* note 17, at 26.

[33] *See UT Freshmen Fall 2008 Report*, *supra* note 3, at 2.

"personal achievement" ("PA") score. The personal achievement score was calculated by giving equal weight to six personal achievement *factors*.[34] The six equally-weighted personal achievement factors were: (1) leadership experience, (2) extracurricular activities, (3) awards and honors, (4) work experience, (5) community service and (6) a "special circumstances" factor, the last of which permitted admissions officers to consider seven sub-factors—five of which were socio-economic-focused and one that was race-conscious.[35] The seven sub-factors of the "special circumstances" personal achievement factor were:

> 1) the socio-economic status of the student's family, 2) whether the student lived in a single-parent home, 3) the language spoken at the student's home, 4) the student's family responsibilities, 5) the socio-economic status of the student's high school, 6) how the student's SAT or ACT score compared to the average score for the student's high school, or 7) the student's race.[36]

Accordingly, race was a mere sub-factor of a factor of the PAI score—a degree of race consciousness that did not unduly harm the admission chances of white applicants to UT Austin.

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[34] *Id.*
[35] *Id.*
[36] *Id.*

C. The Court Should Not Be Misled to Believe that Social Science Evidence Exists that Proves "Large Racial Preferences" in the Form of a "Black Bonus" or an "Asian Penalty" By Which Black Applicants Are Awarded Extra Points or Points Are Deducted From Asian Applicants Because of Their Race

This Court should disregard inaccurate claims, based on either the "mean test score fallacy" or misinterpretation of social science research, that selective universities confer "large racial preferences" in favor of Black and Latino high school students by giving racial "bonuses." It is incorrect to rely on such social science research as proof of the existence of a particular quantum of race-driven advantage and disadvantage. Determinations of the role of race in a particular admissions policy should ideally (when such data is available—as is the case with the Fall 2008 UT admissions cycle) be based on statistical and empirical analysis of the details and admissions outcomes of the admissions policy in question.

Specifically, first, the Court should be aware that virtually all of the social science research of admissions it has been asked by amici to consider is based on a multiplicity of regression *models* (not analysis of the actual real-world results of any specific "real-life" admissions policies). These models are constructed by researchers based only on the data those researchers chose to include and only on the data available at the time of the modeling. Second, the authors of the 2009 study by Thomas Espenshade and Alexandria Radford relied upon by several amici

curiae warn against interpreting their research as proof that the admission of African American students with comparatively lower (yet still high) SAT scores is causally connected to race.[37] Espenshade and Radford state:

> . . . [I]t would be a mistake to interpret the data in Table 3.5 as meaning that elite admissions officers are necessarily giving extra weight to black and Hispanic candidates just because they belong to underrepresented minority groups.[38]

The Court should not infer that admissions officers give extra weight to Black and Latino applicants *just because of* their race (nor should the Court infer that Asian applicants are harmed because of their race). On this point, Espenshade and Radford again warn very explicitly against drawing such a conclusion:

> . . . [I]n our judgment, it is more likely that a proper assessment of these data is that the labels "black" and "Hispanic" are

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[37] *See, e.g.*, Brief of Richard D. Kahlenberg, *supra* note 9, at 6 n. 12; Brief Amicus Curiae of Jonathan Zell in Support of Petitioner at 15 (both citing THOMAS J. ESPENSHADE & ALEXANDRIA RADFORD, NO LONGER SEPARATE, NOT YET EQUAL 92, Table 3.5 (2009). *See also* Brief Amicus Curiae of California Association of Scholars in Support of Petitioner at 29; Brief of Amici Curiae the Asian American Legal Foundation and the Asian American Coalition for Education in Support of Petitioner at 26 (citing generally THOMAS J. ESPENSHADE & ALEXANDRIA RADFORD, NO LONGER SEPARATE, NOT YET EQUAL (2009).)

[38] THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 94 (2009).

> proxies for a constellation of other factors in a candidate's application folder that we do not observe. . . . These unobserved qualities—perhaps having overcome disadvantage and limited opportunity or experiencing challenging family or schooling circumstances—may be positively correlated with the chances of being admitted when a holistic review of an applicant's total materials is conducted. It is these other aspects of race and ethnicity that matter, not race itself. Importantly, if we were able to include these other considerations in our models we believe the effect of being black or Hispanic per se would be diminished. A similar reasoning pertains to the so-called Asian disadvantage in admission. . . . It is likely that incorporating in our models an even fuller range of academic performance measures as well as these other nonacademic factors would cast the effect of coming from an Asian background in a different light.

Just as Espenshade and Radford warn against the conclusion that Black and Latino students are admitted to selective universities *because of their race*, it is a common[39] but misleading error "to infer racial preference based solely on the observed [SAT

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[39] For its use in this litigation, *see e.g.*, Brief Amicus Curiae of Richard Sander and Stuart Taylor, *supra* note 9, at 3-4.

scores] of admitted students."[40] In a 1999 study, labor economists William T. Dickens and Thomas J. Kane explained this "mean test score fallacy" as follows: when "the distribution of standardized test scores" differs between any two groups, "the mean test scores will be lower for people drawn from the second distribution even though both must pass the same relatively high [test] standard."[41]

The existence of differences between the numerical *average* of the SAT scores of all of the Black students admitted to a university and the numerical *average* of the SAT scores of all of the admitted Asian students by no means proves that Black students are awarded "large racial preferences." Instead, such differences—differences between the "White and Asian average SAT score" and the "Black and Latino average SAT score"—are the result of two realities: (1) the fact that selective universities do not base admissions decisions solely on SAT scores and (2) the existence of ongoing racial disparities and *de facto* segregation in American society as well as the present-day vestiges of purposefully racially discriminatory laws and *de jure* segregation.[42]

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[40] Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 19 (Gary Orfield and Edward Miller, eds., 1998).

[41] William T. Dickens and Thomas J. Kane, 38 INDUSTRIAL RELATIONS 331-35,357 (1999).

[42] *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Hernandez. v. Texas*, 347 U.S. 475 (1954); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Westminster Sch. Dist. of Orange Cty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947); *Gong Lum v. Rice*, 275 U.S. 78 (1927); *Tape v. Hurley*, 66 Cal. 473 (1885); *People v. Hall*, 4 Cal. 399 (1854).

The tremendous historical and current racial differences between African Americans and Latinos as compared to Whites and (some) Asians in income, wealth and educational opportunity, all of which have been and continue to be exacerbated by racially segregated housing and exclusion of nonwhites from racially and income integrated neighborhoods with higher quality public school systems, are well-known and well-documented by social scientists and this Court.[43]

Accordingly, differences in the average test scores of whites as compared to blacks do not constitute strong evidence of either "large racial preferences" nor are they proof of "reverse discrimination" against white applicants. Far from conferring "preferences" on Black and Latino applicants, UT Austin, like virtually every selective American university, has since its founding until today admitted vastly more (or exclusively[44]) white students than all ad-

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[43] *See, e.g.*, Gary Orfield and Jongyeon Ee. *Segregating California's Future: Inequality and Its Alternative 60 Years After* Brown v. Board of Education 40 (May 2014) *available at available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/segregating-california2019s-future-inequality-and-its-alternative-60-years-after-brown-v.-board-of-education/orfield-ee-segregating-california-future-brown-at.pdf ("There is a clear pattern of intense double segregation by race and poverty for black and Latino children in California's metro areas the default for a white or Asian family is a middle-class school, while the default for a Latino or black family is a school of concentrated poverty"); *see also, e.g., Texas Dep't Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. ___, No. 13-1371, slip op. at 5 (June 25, 2015).

[44] *See e.g., Sweatt v. Painter*, 339 U.S. 629 (1950).

mitted nonwhite students combined.[45] Despite the pervasive rhetorical use of the term "racial preferences" in the briefs submitted to the Court in this case, Abigail Fisher was not the victim of "racial preferences."[46]

II. This Court Should Ignore the Incorrect Assertion, Based on Incomplete and Cherry-Picked Findings, that "Affluent Blacks" Prevent Low-Income Students From Attending Selective Universities

In determining whether UT Austin's admissions policy is narrowly tailored, the Court should ignore three red-herring claims: (1) the claim that a ruling from this Court striking down UT's admissions policy will somehow increase the degree of socio-economic affirmative action practiced by selective universities, 2) the inaccurate and disingenuous claim that racial affirmative action results in "affluent Blacks" taking admission spaces that should or would otherwise go to low-income students, and 3) the thoroughly repudiated claim that racial affirmative action in favor of African American and Latino

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[45] West-Faulcon, *Forsaking Claims of Merit*, *supra* note 3, at 353.

[46] The race consciousness of UT Austin's admissions policy had no impact whatsoever on Abigail Fisher's admissions chances. Brief for Respondents, *supra* note 17, at 15 ("The summary judgment record is uncontradicted that—due to the stiff competition in 2008 and petitioner's relatively low AI score—petitioner would not have been admitted to the Fall 2008 freshman class even if she had received "a 'perfect' PAI score of 6 [the score that includes race as a possible factor].").

students harms such students because of "mismatch."[47]

A. Revisiting This Court's Ruling in San Antonio v. Rodriguez, Not Striking Down UT Austin's Restrained Race-Consciousness, Would Redress Socio-Economic Injustice and Economic Class-Based Discrimination in Higher Education Admissions

While various amici make a strong policy argument in favor of selective universities adopting admissions policies that result in the admission of substantially greater numbers of low-income students, these policy arguments should have no bearing on this Court's determination of the correctness of the Fifth Circuit's holding that UT Austin's Fall 2008 admissions policy did not violate the Equal Protection Clause. The strained efforts of some amici to link their views on the value of socio-economic affirmative action to racial affirmative action obscure the legally significant issues currently before the Court. A change in the legal doctrine stemming from this Court's decision in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973)—a doctrinal change to protect low-income students as belonging to a "suspect" class warranting special protection under the Fourteenth Amendment Equal Protection Clause or a doctrinal change to protect education as a fundamental right protected under the Fourteenth Amendment Due Process Clause, would better serve

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[47] *See, e.g., generally* SANDER & TAYLOR, MISMATCH, *supra* note 12.

the policy goals articulated by amici than a ruling by this Court striking down UT Austin's minimally race-conscious admissions policy.

B. Because the Number of "High Income," "Upper Class," "Wealthy Blacks" or "Prep School Educated Blacks" is Quite Scant, it is Inaccurate to Claim that the Exclusion of this Particular and Scarce Type of African American High School Student Will Redress Widespread Socio-Economic Injustice Against the Very Large Number of White Low-Income Students Regularly Excluded from Elite Higher Education

In their 2009 research, the authors of a study relied upon by amicus curiae Richard Kahlenberg[48]—Espenshade and Radford—*explicitly* reject Kahlenberg's argument that class-based affirmative action will create more racial diversity than racial affirmative action.[49] They disagree wholly and completely with Kahlenberg's assertion that socio-economic class diversity would offset any decline in racial diversity resulting from the elimination of race-based affirmative action.[50] The Court should be wary of cherry-picking by various amici from the research of Epenshade and Radford.

Whereas several amici in support of petitioner point the Court toward Table 3.5 of this 2009 study, they do not point out that Table 9.3 of that same

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[48] *See* Brief of Richard D. Kahlenberg, *supra* note 9, at 6.

[49] Espenshade and Radford, *supra* note 38, at 356.

[50] *Id.*

study contradicts the assertion that African Americans and Latinos would not be impacted by a legal standard prohibiting racial affirmative action in selective higher education admissions. "Without any doubt, class-based preferences cannot achieve the same ends as racial affirmative action."[51] "[C]lass is a very poor substitute for race for selective colleges seeking racial diversity. The problem is simply one of demographics."[52]

> [T]he most important conclusion to draw from these simulations is that *there is no alternative policy with the capacity to preserve minority student shares observed under racial affirmative action.* If these institutions wish to maintain a critical mass of minority students on their campuses, there is not any feasible and compelling policy on the horizon—at least not one within easy reach—that can accomplish this objective other than a system of race-conscious admission preferences that operate in the context of a holistic and individualized review of all the factors in a candidate's application folder.[53]

Not only is it inaccurate to claim that racial affirmative action can be replaced by (but not continued along with) socio-economic class-based affirma-

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[51] *Id.*

[52] Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions* 448, *in* THE BLACK-WHITE TEST SCORE GAP (Christopher Jencks & Meredith Phillips, eds., 1998)

[53] Espenshade and Radford, *supra* note 38, at 368.

tive action, it is also inaccurate and rather disingenuous to suggest that, under racial affirmative action, "affluent Blacks" are taking admission spaces that should or would otherwise go to low-income students. Social science has not proven this incendiary proposition. First, the study by Professor Richard Sander that supposedly "finds that the proportion of black students at elite colleges coming from the top quartile of the socioeconomic distribution increased from 29% in 1972 to 67% in 1992"[54] is based on a data set of only 61 African American college students.[55]

Second, it is valuable to consider that the study by William C. Bowen and Derek Bok cited for the proposition that "86 percent of African American students at selective colleges are middle or upper-class"[56] is cherry-picked without revealing the actual middle versus upper class breakdown and income measures. As set forth in Table B.2 of the Bowen and Bok study, the findings were that 71% of African American students were "middle class" defined as having a family income over $22,000 and that 15% of African American students had at least one parent who was a college graduate and family income of more than $70,000.[57]

Third, the other study cited to suggest that affirmative action mainly benefits affluent Blacks is another study by Richard Sander.[58] Yet, in that

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[54] Brief of Richard D. Kahlenberg, *supra* note 9, at 8.

[55] SANDER & TAYLOR, MISMATCH , *supra* note 12, at 249 Fig. 16.1.

[56] Brief of Richard D. Kahlenberg, *supra* note 9, at 8.

[57] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 341 Tbl. B.2 (1998).

[58] Brief of Richard D. Kahlenberg, *supra* note 9, at 7.

very study. Professor Sander explicitly states that his findings of substantial financial affluence among Black students at top-ranked law schools is likely incorrect. Sander explains in the study that "It seems fair to say that although most black law students are upper-middle-class [according to his findings], that means something different than what it means when applied to whites or Asians" because "it is important to keep in mind that the measures we use *are particularly likely to overstate black SES*" and "unfortunately, none of the data sources I know of on the SES of the general population of law students help us take these factors into account").[59] Moreover, this study was also based on very small samples of nonwhite students[60] and did not include any income or wealth measures in defining socioeconomic status (only "the education and occupation of the mother (or female guardian) and father (or male guardian)").[61] Nevertheless and contrary to his own explicit acknowledgment that it is likely that his findings were "particularly likely to overstate" Black socioeconomic status, Richard Sander cites this study in his amicus curiae brief in this case to

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[59] Richard Sander, *Class in American Legal Education*, 88 DENVER U.L. REV. 631, 652 (2011) (emphasis added) (noting that "Black households tend to have much lower wealth at a given level of income (or occupation or education) than otherwise comparable white households" and that "middle-class blacks are much more likely to live in segregated neighborhoods with high poverty rates than are whites with otherwise similar SES").

[60] *Id.* at 651 Tbl. 8 (stating in text under the table "[b]ear in mind that in some cells the underlying "n" is quite small, especially for nonwhites, so anomalous numbers are likely to reflect some random variation and should not be taken too literally").

[61] *Id.* at 670 Appendix 1.

support the very conclusion he cautions against in the study itself.[62]

C. None of this Court's Narrow Tailoring Precedent Requires UT Austin to Exclude the Historically Small Number of Middle and Upper Class African Americans in the Name of Socio-Economic Justice or Purported "Mismatch" Based on SAT Scores

The now decades-old "mismatch" theory that nonwhites from racial groups with lower, on average, SAT scores are harmed by their admission to selective universities is based on the unproven and unprovable assertion that blacks who graduate from selective colleges and universities but do so with relatively lower grades or class rank are harmed by attending such institutions. The research contending to support the mismatch theory rarely acknowledges the fact that such contentions focus almost exclusively on college grades (to the exclusion of college graduation rates).[63]

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[62] *See* Brief Amicus Curiae of Richard Sander and Stuart Taylor, *supra* note 9, at 30 and text accompanying note 74 (stating in amicus curiae brief that "racial preferences contribute little socioeconomic diversity to most schools that use them, *because most of those receiving these preferences are from elite backgrounds*") (emphasis added) (citing Sander, *Class in American Legal Education*, *supra* note 58, without noting his own statement that "the measures we use are particularly likely to overstate black SES").

[63] *Compare* Brief Amicus Curiae of Richard Sander and Stuart Taylor at 9-10, n. 25, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (acknowledging that "some" studies find "high graduation rates for racial-preference recipients at more selec-

The inference that Black and Latino high school students are harmed by attending elite educational institutions or would enjoy better life outcomes if they chose less selective institutions is unsupported by empirical research. Instead, social science research has consistently shown that the nonwhite, particularly African American, students supposedly harmed by being "mismatched" at more elite universities are more likely to successfully *graduate* from the selective universities to which they are admitted *and benefit substantially from living life as graduates of more prominent and elite educational institutions (even if their GPA's are lower than either the average white GPA, the GPA predicted by their SAT scores, or their GPA had they attended a less elite institution).*[64]

III. It Would Violate Principles of Federalism for this Court to Define for the Flagship Public University in the State of Texas the Extent to Which Race Still Matters

There is no question that UT Austin's had a compelling government interest in considering race in a restrained manner to select an entering class that was racially diverse in a multi-faceted way. Much of the social science evidence the Court has

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tive institutions" but suggesting, without empirical support, that graduation from selective universities is insignificant to African Americans in contrast to vaguely-referenced psychological harms or because "elite private colleges" commonly "adjust policies or inflate grades").

[64] *See, e.g.*, BOWEN & BOK, *supra* note 57, at 59-70.

been asked to consider by amici shed light on questions of education policy and the relative policy significance of class versus race in modern American society. It is more than reasonable and within the general powers of the State of Texas to adopt policies for granting access to its flagship university that are based on the policy conclusion that "race *and* class" matter. It is entirely clear that the Constitution of the United States does not require Texas to adopt the view that "class" must be considered *to the exclusion of race* in allocating one of the state's most valuable resources—high quality higher education. In this case, the Court should address the constitutional question before it and should not take sides in the policy debates presented by various amici curiae briefs. [65]

IV. The Court Should Reject "Folk" Understandings of Test Scores and Note That Racial Skews in the Averaged Scores of Blacks as Compared to Whites Do Not Mean Blacks As a Racial Group are Undeserving When Admitted to Selective Colleges and Universities

Despite its repeated and definitive debunking by well-regarded social science,[66] the mean test score

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[65] *Cf, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("[I]t is entirely clear that the Constitution of the United States . . takes no sides in this educational debate.")

[66] Kane, *Misconceptions supra* note 40, at 19-20; Kane, *Racial and Ethnic Preferences in College Admissions supra* note 52, at 435.

fallacy lives on because it perpetuates the myth that standardized admissions tests like the SAT[67] are such precise tools for measuring future success in college that non-test-driven admissions criteria are anti-meritocratic. The idea that an applicant with a higher SAT score is *per se* more deserving of admission than a differentially credentialed applicant with a lower SAT score is based on a non-scientific "folk" understanding of the nature of mental ability and testing.[68]

The science and statistics behind the meaning of SAT scores are clear in delineating the limits of the traditional SAT college admissions test's predictive power. Although advances in intelligence theory and mental testing show promise for the future, conventional currently-used admissions test like the SAT require substantial augmentation with non-test score admissions criteria to explain the variation in later-college and real-life success left unexplained by SAT scores. Quite contrary to the oft-repeated "mismatch" contention that African Americans are harmed by their admission to universities with white average SAT scores higher than their own because they earn lower college grades, a substantial body of social science research shows that African Americans admitted with lower SAT scores than the uni-

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[67] Originally called the Scholastic Aptitude Test, "SAT" no longer has an official meaning. TONY MONCHINSKI, CRITICAL PEDAGOGY AND THE EVERYDAY CLASSROOM 171 (2008) (observing that the acronym SAT once stood for "scholastic *aptitude* test" and later "scholastic *assessment* test" but that "[q]uestions of what the SAT supposedly assessed led to the jettisoning of that acronym and today the initials SAT stand for nothing").

[68] *See* Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1245 (2011).

versity's white average score succeed in graduating from selective universities and benefit greatly from their admission.

Unfortunately, "at the end of the roughly hundred-year period that mass-marketed standardized tests have been in existence, their predictive power still leaves substantial room for improvement."[69] Far from perfect in its prediction, the 13% power of predicting first-year college GPA based on SAT score and the 23% predictive power of using SAT score combined with high school GPA to predict the same early college outcome is helpful but not complete information for universities to use in assessing the academic merit of applicants.[70]

Because of the undisputed limitations in the predictive capacity of the SAT, reliance on the SAT as the *sole* criterion for admission to selective universities would actually be anti-meritocratic. Even when used in conjunction with high school grades, statistical models based on SAT score are far from

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[69] *Id.* at 1269 (examining modern innovation in mental testing in light of the fact that conventional standardized tests like the SAT "leave more of the variation in intelligence and future academic success unexplained than they actually explain"). Richard Atkinson is former President of the University of California and an expert in cognitive science and psychology. During his presidency, Atkinson gave a speech critical of the amount of weight placed on SAT scores in college admissions and announced plans to no longer require students applying to take the SAT I. *See* Richard C. Atkinson, President, University of California, The 2001 Robert J. Atwell Distinguished Lecture at the 83rd Annual Meeting of the American Council on Education (Feb. 18, 2001), *available at* http://www.ucop.edu/news/sat/speech.html.

[70] *See* West-Faulcon, *More Intelligent Design*, *supra* note 68, at 1264-68.

perfectly correlated with test-taker's GPA at the end of the freshman year of college. The correlation is even less with grades beyond the first year of college or with whether test-takers graduate from college.[71]

CONCLUSION

UT Austin's Fall 2008 admissions policy did not violate Abigail Fisher's rights under the Fourteenth Amendment Equal Protection Clause.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[71] *See, e.g.*, Richard C. Atkinson & Saul Geiser, *Reflections on a Century of College Admissions Tests*, 38 EDUC. RESEARCHER 665, 672 (2009).